United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7437

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 75-7437

SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

-against-

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of FLAGG BROTHERS, INC., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

BRIEF FOR WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. AND THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, DEFENDANTS-APPELLEES (HEREINAFTER, TOGETHER WITH THE DEFENDANTS-APPELLEES, THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., ARE REFERRED TO AS "INTERVENING APPELLEES")

ORIGINAL WITH AFFIDAVIT OF SERVICE

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PRELIMINARY STATEMENT

In the action below, the Plaintiffs-Appellants sought, inter alia, a judicial declaration of constitutional

invalidity of two sections of the New York Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehousemen's lien for his storage and other charges; and Section 7-210 sets forth the procedure by which this lien may be enforced. The within constitutional challenge is grounded upon the claim that these sections violate the due process and equal protection clauses of Amendment Fourteen, United States Constitution. The complaint also alleges class action status.

THE DECISION BELOW

The issues were brought on before Judge Werker in the United States District Court for the Southern District of New York by motion for class action certification, and motion and cross-motion for summary judgment. Judge Werker's decision dismissed the action upon the ground that sufficient State involvement to confer jurisdiction upon the District Court, was lacking. The issue of class action was not touched upon. (A207-223).

THE ISSUES

The questions presented on appeal are:

1. Was the Court below correct in concluding that there is insufficient State involvement in the enforcement of warehousemen's liens to confer jurisdiction upon

a Federal District Court under 28 U.S.C 1343 (3), or to state a claim under 42 U.S.C. 1983?

2. Is the action a proper class action under Rule 23, Rules of Civil Procedure?

Regarding the second question, it should be noted that in or about the month of February, 1974, the attorneys for the principal parties (the original plaintiff and defendants) stipulated that the action was proper for class action as to the claims for injunction and declaratory relief (A33-34a). This agreement, however, predated the intervention of the Intervening Appellees by virtue of Order dated June 25, 1974 (A91-108). The stipulation, therefore, is not binding upon the Intervening Appellees and, even if this were not so, the stipulation never received judicial sanction.

THE ARGUMENT

POINT I

NEITHER THE WAREHOUSEMEN'S LIEN (SECTION 7-209, N.Y. UNIFORM COMMERCIAL CODE) NOR ITS ENFORCEMENT (SECTION 7-210, SUPRA) CONSTITUTES STATE ACTION.

It is conceded by Appellants at p.15 of their brief, that the "significant involvement" of the State is a prerequisite for the maintenance of the suit herein. The tests for determination of State action or involvement were well articulated in Jackson v. Statler, 496 F.2d 623 (2nd Cir.) cert. den. 420 U.S.927, i.e.,

> "(1) The degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms. Each of these factors is material; no one factor is conclusive."

While each of these factors was held to be material, and even though all are not essential elements to a finding of State action, it is significant that the case herein meets none of the enumerated tests.

The bailment relationship that springs up upon the basis of the storage of goods in a public warehouse is a private, contractual relationship. There are no involvements

with any governmental agencies or officials, regulatory or otherwise, nor do the allegedly offending sections delegate any power to any such agencies or officials. More specifically, the warehousemen's lien enforcement procedure does not fall within the purview of the category of actions that are normally performed by a public official. In the enforcement procedure, there is no need for the intercession of any public official such as, for example, a sheriff, as would be the case in instances where there is the necessity as the first step in an enforcement procedure to seize goods or property in order to satisfy a claim arising from an issue not related to the rem. James v. Pinnex, 495 F.2d 206.

Appellants argue that the "self-help" aspect of the warehousemen's lien enforcement procedure is fatal since it did not exist at common law. Aside from the fact that, not infrequently, the right of warehousemen's lien enforcement is created by contract, and, therefore, neither dependent upon nor created by statute, the codification, per se, does not measure up to the quantitative standard of State involvement sufficient to create this jurisdictional sine qua non. James v. Pinnex, supra.

Neither the enactment of Section 7-210, New York Uniform Commercial Code, nor of its predecessor statute, Section 118, General Business Law, conferred upon public warehousemen any powers or functions which are governmental

in nature, as contended by Appellants. None of the cases cited at p.24 of Appellants' brief is apposite.

Evans v. Newton, 382, U.S.296 involved an attempt by certain trustees to enforce a racial restriction upon the use of a privately-owned and managed park. Held, a park, by its very nature, is public in character, and although privately-held and managed, it is subject to the Fourteenth Amendment.

In Terry v. Adams, 345 U.S.461, a private association selected candidates to run in primary elections. Their selections excluded negroes. Held, these practices deprive negroes of the right to vote and, therefore, offended the Fifteenth Amendment. It goes without saying that any action or proceeding involving the election of public officials is intrinsically governmental notwithstanding that the process may be under the aegis of a private organization.

A similar holding was expressed in Smith v. Allwright, 321 U.S.649.

Perez v. Sugarman, 499 F.2d 761 involved a child-care agency that retained custody of neglected or abandoned children - a function that is patently public.

It is manifestly fallacious and inappropriate for Appellants to attempt to equate the clearly public function disclosed in Evans, Terry, Smith and Perez, supra, with the inherently private character of the storage of goods in a

public warehouse. The only significance of the word "public" in this context is that the facilities and services of the warehouseman are available to the public in much the same way as goods and services are offered to the public by any other entrepreneur.

Hernandez v. European, 487 F.2d 378, as pointed out in Judge Werker's opinion below, did not touch upon the question of State action, and cannot stand as support for the affirmative of this issue. In addition, Judge Werker pointed out that Hernandez merely indicated the bare possibility of a holding of constitutional invalidity upon remand. Moreover, the possession element in a garageman's repair situation as in Hernandez, is a far cry from the warehousing situation where the nub of the relationship is a mutual benefit bailment rather than unilateral detention to enforce payment of a repair bill and incidental storage.

Appellants contend that all lien enforcement procedures are governmental functions. This simplistic proposition flies in the face of James v. Pinnex, supra. The enforcement of a lien arising from possession is not traditionally a function of the sheriff. His office is normally called into play, only where there is a need to seize property in order to achieve the remedy.

It is the view of Appellants that warehousemen are

extensively regulated because of various sections in Title 7, New York Uniform Commercial Code, in addition to Sections 7-209 and 7-210, and that, therefore, State action is present. This view amounts to a reductio ad absurdum. Extended to its logical conclusion, this hypothesis would mean that in instances where contractual and other relationships among members of society are governed by substantive rules promulgated by legislative enactment, State action is indicated ipso facto. It is interesting to observe that in each of these U.C.C. references at p.31 of Appellants' brief, the subject matter relates exclusively to purely private, contractual matters, i.e., the form of the warehouse receipt, termination of storage, duty of keeping non-fungible goods separate, altered warehouse receipts, etc. The contention that these substantive provisions constitute regulations that are public and governmental is without merit.

The conclusion of the Court below that there was a failure to show sufficient State involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a Federal Court is sound, and comports with the weight of authority.

POINT II

THE WAREHOUSEMEN'S LIEN AND ENFORCEMENT STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The requirements of Section 7-210 of the New York Uniform Commercial Code respecting notice satisfies due process under the Fourteenth Amendment. Magro v. Lentini, 338 F.Supp.464, aff'd 460 F.2d 1064, cert. den. 406 U.S. 961.

Appellants have again relied upon inapposite and readily distinguishable authorities.

North Georgia v. Di Chem, -U.S.-, 42 L.Ed. 751 (cited by Appellants as 95 S.Ct. 719) relates to a State garnishment proceeding which entails a taking of property, namely wages. This situation is neither comparable with nor analogous to the enforcement of a lien that springs for bailment which is a voluntary, bilateral contractual relationship.

In Mitchell v. W. T. Grant, 416 U.S. 600, the issue involved a judicial proceeding wherein a judge ordered a sequestration of property at the behest of a creditor to enforce a vendor's lien. Apparently, Appellants are impressed by, and are relying upon this case since the Court, in ruling that the proceeding therein comported with due process, mentioned the fact that there was judicial control of the process from beginning to end. It is difficult to comprehend

this decision's relevancy to the warehousemen's lien enforcement situation which does not even approximate anything as drastic or extreme as the sequestration of a debtor's property.

In Fuentes v. Shevin, 407 U.S.67, a seizure of property pursuant to replevin statutes in Florida and Pennsylvania was held to offend the Fourteenth Amendment upon the ground that not only was there a deprivation of the right to be heard, but, more significantly, the seizure was ex parte so that the owner did not even have any advance notice of the action. A vital distinction is readily apparent. First, Fuentes involved a seizure of the property. In the warehouse situation, there is no seizure; the property is already in the lawful possession of the warehouseman as bailee. Secondly, in Fuentes, the owner was deprived of possession by a writ of replevin issued without any notice to him. The essential requirement of the warehousemen's lien enforcement statute, Section 7-210, U.C.C., is that notice must be given to "all persons known to claim an interest in the goods". The notice must set forth all pertinent particulars. In the case of a private sale (available in the case of goods stored by a merchant in the course of his business) Section 7-210(1), supra, the notice must include "a statement of the amount due, the nature of the proposed

sale, and the time and place of any public sale." In addition, the sale must be made "in a commercially reasonable manner" (which the Section defines). In the case of a public sale, Section 7-210(2) supra, the notice must be given in person or delivered by registered or certified mail and it must comply with a number of further definitive requirements.

Thus, unlike Fuentes, reasonable and adequate notice is provided for, plus advertising if the Section 7-210(2), supra, method is applicable. Accordingly, the bailor, or any other person claiming an interest in the goods, have ample opportunity to take such action as may be advisable to forestall the procedure if any improprieties are present. Indeed, in the case at Bar, the Plaintiffs not only had the opportunity to take action, but they did, in fact, take action which effectively stopped the principal defendants in their tracks, as it were. Even if the persons aggrieved do not take action, they still have a viable and adequate remedy which is prescribed by Section 7-210(9):

> "The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this Section and in case of willful violation is liable for conversion."

The bailor is, thus, clothed with reasonable safeguards which the Appellants have disregarded in their push toward the strained and unreasonable claim of lack of duc process.

Appellants cite next in their effort to substantiate their claim of lack of due process Sniadach v. Family Finance, 395 U.S.337. As in Fuentes, this case concerns a State statute that authorizes what is, in effect, a seizure (in this instance, a "freezing" of the wages of a debtor at the behest of a creditor prior to suit) without notice and prior hearing. This case is inapposite for the reasons above discussed in respect of Fuentes. Magro v. Lentini, supra.

Jones v. Banner, 48 App.Div.2d, 928, 369 N.Y.S.2d 804, footnoted at p.35 of Appellants' brief whose factual pattern is similar to that of the case at Bar will be discussed under Point III.

POINT III

THE ISSUE OF CONSTITUTIONALITY IS PREMATURE, MOOT, AND UNNECESSARY.

Both the principal Plaintiff, Brooks, and Plaintiff-Intervenor Jones have, by virtue of their respective actions taken below, stopped the principal Defendant, Flagg, from enforcing its alleged warehousemen's liens. The goods of Plaintiff, Brooks, have been returned to her in their entirety (A155) and the goods of the other Plaintiff, Jones, are being held subject to an adjudication or settlement of the issue of proper storage charges (A148, 149, 155-158). As to these remaining issues, both Plaintiffs have adequate remedies, as in the case of Jones v. Banner, supra, where the Appellate Division, 2nd Department said:

> "Resolution of the constitutional issue [of the warehousemen's lien and its enforcement] would be obviated by a determination favorable to Plaintiff on the cause of action to recover possession of the chattels. Such a disposition would be much preferable to a determination on constitutional grounds (cite)." (Bracketed matter added).

It is submitted that the Plaintiffs-Appellants would be made whole by judgments properly assessing their damages, if any, and/or correctly determining whether storage charges are due and, if so, their amounts, and, by replevin, in the case of Plaintiff, Jones. Declaratory judgments and injunctive relief are improper and unnecessary in the circum-

stances extant. As was stated in Golden v. Zwickler, 394 U.S. 103:

> "No federal court, whether this Court or a district court, has jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconciliable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.", citing Liverpool v. Commissioners, 113 U.S.33,39. (Underlined words italicized in original report).

There is not a single controversy extant herein that cannot be adequately adjudged by common law actions available to the Plaintiffs-Appellants.

POINT IV

CLASS ACTION STATUS IS IMPROPER BOTH AS TO PLAINTIFFS AND DEFENDANTS.

The learned Court below did not reach this issue since its consideration was not a ground essential to the decision of dismissal which rested entirely upon a finding of insufficient State involvement. Accordingly, if the judgment below should be affirmed, the question of class action would be moot. The issue, however, would come into play if this Court should order a remand. This point for argument is therefore, presented in that context.

It is undisputed that neither the Plaintiffs nor the principal Defendant (Flagg) is representative of the entire public warehouse industry. Conversely, the class of persons who deal with public warehouses (bailors) are heterogeneous.

A brief comparison between the type of warehouses exemplified by the Defendant-Appellant, Flagg, and the types of warehouses exemplified by the Intervening Appellees, clearly reflects this heterogeneity. As was pointed out at Suppl.A5, "The principal Defendant herein, Flagg Brothers, Inc., although presumably, a public warehouse, is * * * not a commercial warehouse. Flagg is in the business of conducting what is commonly referred to as a moving and

storage business, the thrust of which is to transport and place in dead storage non-commercial articles of personal property consisting mainly of used furniture and household furnishings belonging to the consuming or general public."

On the other hand, the Intervening-Appellees consist of commercial warehouses (sometimes referred to as merchandise warehouses) and refrigerated warehouses. These warehouses do not deal with the general public; they provide storage and distribution services to industrial and commercial accounts, and they handle an infinite variety of goods. They do not in any way duplicate or compete with the furniture warehouses such as the establishments of the type maintained by Flagg. The refrigerated warehouses are still another type of enterprise. Their services are similar to commercial or merchandise warehouses except that they store and handle perishables requiring refrigeration. (A162-166, 169, 170, 171; Suppl. A4).

The heterogeneity of the class of plaintiffs (bailors) is equally striking. It bears repetition to note that bailors who patronize the Flagg type of warehouse (moving and storage of used furniture and household furnishings) and bailors who patronize the merchandise or commercial and the refrigerated warehouses, are totally different. In the former category, the bailors are members of the public at

large; in the latter, the bailors are from the world of business, e.g., manufacturers, distributors, retailers, importers, exporters, commodity exchanges, banking and financial (Suppl.A6).

It follows that the differences that exist both as to bailors and warehousemen are so substantial that at least two of the prerequisites to a class action are not satisfied, namely, Rule 23(a)(2) and (3) of the Federal Rules of Civil Procedure. Sub-division (2) requires the presence of questions of law or fact common to the class. Because of the e vast differences amongst various types of warehousemen, it cannot be said that there are questions of fact common to the class. The prerequisite set forth in sub-division (3) states:

> "The claims or defenses of the representative parties are typical of the claims or defenses of the class, * * *".

As was pointed out to the Court below, "Class action status is neither warranted nor justified. The substantial difference between commercial warehouses and furniture warehouses, * * *, and the unique circumstances surrounding the transactions between Plaintiffs and the Defendant, Flagg, strongly militate against class action treatment. Class action status, <u>if any</u>, should be confined to the type of establishment represented by the Defendant,

Flagg, as well as the * * * unique circumstances, i.e., removal of furniture and household furnishings by a city marshal or similar officer pursuant to a judgment of the State Court, and the placing of such goods in the public warehouses. Similar circumstances * * * never arise in the commercial warehousing industry." (Suppl.A12 and 13).

The uncontroverted facts disclosed in the record manifest fundamental factual distinctions among bailors, such as the plaintiffs, and the commercial, business and financial community that exemplify the class of bailors who patronize commercial, merchandise and refrigerated warehouses such as the Intervening Appellees. There is a vast distinction between furniture and household movers and storers such as the Defendant-Appellee, Flagg, on the one hand, and, on the other hand, the commercial, merchandise and refrigerated warehouses such as the Intervening Appellees. The conclusion is, therefore, inescapable, that these distinctions are so vast and significant that class action, both as to plaintiffs and defendants, is improper.

CONCLUSIONS

1. THE COURT BELOW WAS ENTIRELY CORRECT IN DISMISSING THE ACTION UPON THE GROUND THAT SUFFICIENT STATE INVOLVEMENT TO CONFER JURISDICTION UPON THE DISTRICT COURT, WAS LACKING.

2. DUE TO THE HETEROGENEITY THAT CHARACTERIZES BAILORS OF PUBLIC WAREHOUSES, AND THE TYPE OF ESTABLISHMENTS THAT COMPRISE THE BROAD SCOPE OF PUBLIC WAREHOUSEMEN, CLASS ACTION IS NOT INDICATED.

3. THE WAREHOUSEMEN'S LIEN AND ITS ENFORCEMENT PROCEDURE SATISFY THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS.

4. BOTH OF THE PLAINTIFFS-~~APPELLEES~~ appellants HAVE ADEQUATE REMEDIES AT LAW SO THAT THE DRASTIC AND EXTRAORDINARY RELIEF DEMANDED BY THEM CONSISTING OF A DECLARATION OF CONSTITUTIONAL INVALIDITY AND OTHER EQUITABLE REMEDIES, IS WHOLLY UNJUSTIFIABLE.

THE DECISION BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

Jaffe Shaw & Rosenberg

JAFFE, SHAW & ROSENBERG, Attorneys
for Warehousemen's Association of
New York and New Jersey, Inc.*
and the Cold Storage Warehousemen's
Association of the Port of New York,
Defendants-Appellees

ARNOLD H. SHAW,
of Counsel

* At the time of its intervention, this party's name was "Warehousemen's Association of the Port of New York, Inc.". It has since been duly changed to "Warehousemen's Association of New York and New Jersey, Inc." The caption herein was duly amended in the District Court to reflect this change.

ADDENDUM PURSUANT TO RULE 28(f),
FEDERAL RULES OF APPELLATE PROCEDURE

§ 7—209. Lien of Warehouseman

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. L.1962, c. 553, eff. Sept. 27, 1964.

§ 7—210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion. L.1962, c. 553; amended L.1963, c. 1003, § 15, eff. Sept. 27, 1964.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

JOYCE L. LAURO, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York.

That on the 15th day of December, 1975, deponent served the within Brief upon the attorneys listed below*, at the address designated by said attorneys for that purpose set forth below* by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Joyce L. Lauro

Sworn to before me this
15th day of December, 1975.

NOTARY PUBLIC

ARNOLD H. SHAW
Notary Public, State of New York
No. 30-3618700
Qualified in Nassau County
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